8) Although counsel for plaintiff was aware of animosity on the part of the trial judge herein prior to the attempted confirmation of default, he was not aware, and the plaintiff was not aware, that the aforesaid animosity, bias, prejudice and interest would prevent a fair trial in this matter.

On March 29, 1968 Judge Dixon issued a contempt rule which read in pertinent part:

> "That on March 21, 1968, Dan A. Spencer did file a pleading in the above numbered and entitled cause which contained scandalous, insulting, and abusive language in irrelevant criticism of the judge of said court, which pleading is attached hereto and made a part hereof, and which language, particularly in paragraph four thereof, impairs the dignity of the Court and the respect for its authority, contrary to the law of the State of Louisiana" (A. 10).[2]

Judge R. B. Williams of the Tenth Judicial District Court was appointed to hear the contempt proceedings, which convened on June 10, 1969.

---

[2] On March 28, 1968, appellant instituted an action in the United States District Court for the Western District of Louisiana, reported as *Spencer* v. *Dixon*, 290 F. Supp. 531 (1968). Appellant sought to enjoin further proceedings upon the contempt citation and sought money damages for violation of his constitutional rights. 290 F. Supp. at 532. He alleged, *inter alia*, that Articles 221, *et seq.* of the Louisiana Code of Civil Procedure, detailing contempt, were unconstitutional on their face and as applied and that the contempt citation against him violated the Fifth, Sixth, and Fourteenth Amendments, in that it subjected him to trial by the judge who had cited him for contempt. 290 F. Supp. at 532-533. The court issued a temporary restraining order but on March 29, 1968, amended it to allow its vacation should a judge other than Judge Dixon, who had issued the contempt citation, be assigned for the hearing. 290 F. Supp. at 533.

Appellant thereafter voluntarily moved for dismissal of his appeal in the Fifth Circuit.

The entire proceeding consisted of a dialogue—part law, part fact—between appellant and Judge Williams (A. 14-26). No evidence was introduced by either side.[3] Judge Williams commented that

> "The only matters that may be entered into are, first, your response to the rule—in which there is no attempt on your part to say you didn't sign it or that you weren't there or something of that sort—and, second, no attempt on your part to disavow the instrument in some part or other" (A. 20).

Solely upon the motion to recuse,[4] Judge Williams found appellant guilty of contempt. He said (A. 23):

> "The thrust of your argument is that what was said was said by you or through your client addressed to a person. That is not your privilege. Your privilege in addressing a matter to a representative of the State and the Judiciary means that you are addressing it to the office that is occupied by the individual. You as a member of the Louisiana State Bar are not as privileged as some other persons are because of your high position, and you are an officer of this Court. When you use the words in addressing it to the District Judge

[3] Appellant sought to offer testimony by four of the judges of the First District Court "to the effect that Judge Dixon consulted them regarding this matter and that they had advised him that contempt proceedings were not advisable, the thrust of it being that Judge Dixon did not institute this contempt proceeding with any hope of getting any valid conviction. I would also call those judges as character witnesses for myself and as persons who have knowledge of the lengthy disputation between Judge Dixon and myself" (A. 19). Judge Williams ruled that testimony inadmissible (A. 20).

[4] Judge Williams had not witnessed the alleged contempt.

that he is unfit—'Unfit therefor by virtue of corruption, favoritism, oppression and misfeasance in office' —when you use those words you have addressed to that Court an expression which is defamatory of not only the person but the Court. In doing so you bring about that area of reaction not only to the members of the bar but to the general public, an area of condemnation, without any necessity.

In this particular case we had a suit for separation from bed and board. The rights of the parties, as you well know, may be protected by a proper appeal from a judgment, whether it was rendered in the manner in which you have expressed or not. So we address ourselves solely to the verbage and its meaning. 'Unfit by virtue of corruption, favoritism, oppression and misfeasance in office.' The result meaning animosity, bias, prejudice and interest against you personally that would prevent a fair trial of the matter. It is indicative that you are attributing to a member of the Judiciary and a member of the First Judicial District Court that he had already judged this case.

It is true that a question of contempt is peculiar to each individual case. You have alleged that these expressions were those of your client, but in reality it is an expression of your own and of your own ego."

Appellant was sentenced to twenty-four hours in jail and was fined $100.00 and costs.

Summary of Argument

I(A). The Code of Professional Responsibility requires a lawyer to proceed zealously on behalf of his client without fear of personal penalties, and the Constitution protects such "'fearless, vigorous, and effective advocacy'." *Offutt* v. *United States*, 348 U.S. 11, 13 (1954). See also *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932); Canons 6 and 7, Code of Professional Responsibility. In the face of this unmistakable duty, Art. 222(3) must be seen as an abridgement of the First Amendment on its face. It directly forbids "insulting, abusive, or discourteous" speech of "irrelevant criticism," leaving the final judgment to the subjective discretion of a judge, instead of requiring that the words be "court disrupting . . . " *In re Oliver*, 333 U.S. 257, 274 (1948). See also *Holt* v. *Virginia*, 381 U.S. 131 (1965); *In re McConnell*, 370 U.S. 230 (1962). Moreover, in this case, where classic and lawyer-like language alleging bias was used, the application of Art. 222(3) offends the First Amendment. To find appellant guilty of contempt is to draw too rigid a line between the standards for in-court and those which have been established for out-of-court contempt. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). To sustain the contempt conviction here would be to exclude the First Amendment from the courtroom.

I(B). Art. 222(3) is a vague and overbroad enactment. It is vague because it leaves a lawyer to wonder at the meaning of such subjective and indecisive words as "insulting" and "abusive." See *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Burstyn* v. *Wilson*, 343

U.S. 495 (1954). It is overbroad because it can reach unintentional conduct and because it fails to distinguish expression that obstructs proceedings from that which does not. *In re McConnell, supra; In re Michael*, 326 U.S. 224 (1945). See also *United States* v. *Robel*, 389 U.S. 258 (1967). A contempt statute which does not by its terms or as construed require obstruction of justice is dangerously overbroad, not only because it directly touches speech but also because the summary nature of contempt proceedings requires the strictest standard of constitutionality.

II. No evidence supports appellant's contempt conviction, as required by due process. *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961). Appellant's motion for recusation asserted a fact describing conduct engaged in by his client which could lead to the fair conclusion that the judge would be biased against the client. The conduct referred to was described in words taken from the Louisiana Constitution, Art. IX, Sec. 1, and from the Louisiana Code of Civil Procedure, Art. 151(5). Not only was the motion not evidence of "insulting, abusive or discourteous" words of "irrelevant criticism," it was a restrained and professional effort, clearly proper in relation to the duty a lawyer owes his client.

ARGUMENT

I.

Art. 222(3) on its face and as construed and applied in this case violates the First Amendment.

Introduction

Canon 7 of the Code of Professional Responsibility admonishes the bar to "represent a client zealously within the bounds of law."[5] In explanation of this duty, Sec. EC 7-3 of Canon 7 provides that " . . . While serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law," and Sec. EC 7-4 provides:

> The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

This recognition of a lawyer's professional responsibility is grounded not in ethics alone but in constitutional doctrine as well. Recognizing that the rights of litigants

---

[5] The new code adopted by the House of Delegates of the American Bar Association became effective January 1, 1970. *Cf.* Canon 15, Canons of Professional Ethics.

depend substantially on the vigor and competence of counsel, this Court said in *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

This Court has also said that "counsel must be protected in the right of an accused to 'fearless, vigorous, and effective' advocacy . . . " *Offutt* v. *United States*, 348 U.S. 11, 13 (1954). And obviously, as this Court has made clear, the fundamental right to argue one side of the case includes the right to file pleadings:

> "The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. See Willner v. Committee on Character and Fitness, 373 U.S. 96, 105 . . . " *Holt* v. *Virginia*, 381 U.S. 131, 136 (1965).

It follows that the right of a litigant to counsel and to all the elements of due process cannot be separated from but are dependent upon the extent to which they are recognized by the courts to reside in his lawyer, to whom the protection of a litigant's rights are necessarily delegated. Consequently, it is an attorney's duty not to omit to pursue a matter affecting his client's rights because of fear of offending the judge. Indeed, it is a lawyer's duty to assert claims on his client's behalf even at the risk of mistake or offense to the court.

---

[6] *Cf.* Canons 4 and 5, Canons of Professional Ethics.

In *Caldwell* v. *U. S.*, 28 F.2d 684 (9th Cir. 1928), an attorney had been found guilty of contempt because he had rephrased a question which, in the opinion of the trial court, was immaterial to the proceedings. The trial judge had held that the attorney's purpose was to evade the court's ruling and that the questioning was "disorderly and obstructive."[7] Although the Court of Appeals found that the questioning at issue was in fact immaterial, counsel's good faith belief that it was not gave him the "right, if not [the] duty" to proceed. The court held that the "intent to be subordinate" must be "clear" if punishment for such questioning was not "to have the result of deterring an attorney of less courage and experience from doing his full duty to his client." *Ibid.*

Appellant here was not only under a moral and ethical obligation to represent his client competently without leaving matters to chance,[8] he also bore a profound constitutional responsibility. *Powell* v. *Alabama*, *supra*; *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). It will be a sad day in the long tradition of courageous representation by the bar if a lawyer can validly be held in contempt for filing papers which contain good faith allegations made on a client's behalf. In such event, lawyers will be deterred from fulfilling the admonition of the new Code of Professional Responsibility that a lawyer's "obligation to act compe-

---

[7] *Newman* v. *U. S.*, 28 F.2d 681, 683 (9th Cir. 1928). *Newman* is the case out of which the contempt proceedings in *Caldwell* arose.

[8] "A lawyer should represent a client competently." Canon 6, Code of Professional Responsibility.

"Having undertaken representation a lawyer should use proper care to safeguard the interest of his client . . ." See. EC 6-4, Canon 6.

tently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty." Canon 6, EC 6-5. The Code's preamble recognizes that "Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimal standards." Appellant's motion demonstrated the "higher motivation" to which the Code would have lawyers aspire, and in its abundant use of statutory language, paid careful respect to the necessary proprieties. No more can be required of appellant under the law; no less was required of him by his ethical and constitutional duty to his client.

A. *Art. 222(3) punishes the exercise of expression protected by the First Amendment.*

Contempt proceedings often implicate First Amendment rights.

> "Since most disobedience which would constitute a contempt is involved in some act which might well come within the protection of the First Amendment, the possibilities of conflict are myriad. One can examine a contempt case, and the chances are high that it involves some form of speech when silence was appropriate, or silence when speech was demanded."[9]

Of the various purposes served by the First Amendment, none can be of greater importance than that served by a lawyer charged with advocating the cause of another in a court of law.[10] Limitations upon an attorney's speech in

---

[9] Goldfarb, The Contempt Power 191 (Columbia Univ. Press 1963).

[10] "The decision which penalizes [an attorney] for . . . zeal sanctions censorship inside a courtroom where the ideals of freedom

the course of advocating his client's cause in court are justified only to protect the judicial process from actual disruption. It would be a perversion of the judicial process if attorneys, whose efforts are central to adversarial proceedings, could be punished for anything less.

Nonetheless, Art. 222(3) forbids any language of "irrelevant criticism" deemed "insulting, abusive, or discourteous." This language directly regulating speech has not been limited by the Supreme Court of Louisiana, as this Court has limited federal contempt laws, to apply to instances of "suppression . . . of court-disrupting misconduct," *In re Oliver*, 333 U.S. 257, 274 (1948), and to conduct or language which, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Cooke* v. *United States*, 267 U.S. 517, 536 (1925). Article 222(3) clearly goes beyond the First Amendment and this Court's decisions.

In *Holt* v. *Virginia*, 381 U.S. 131 (1965), a case very much like the one at bar, this Court rejected the argument that the filing of a motion such as that at issue here could support a contempt conviction. The *Holt* motion for change of venue based on the judge's bias went much further than appellant's motion. The relevant sections of the *Holt* motion read as follows:

> "3. That the said Judge Carlton E. Holladay, who presided as Judge in said libel suit, and who fails and refuses to disqualify himself as Judge in the pending trial of the Defendant, E. A. Dawley, Jr., has

---

of speech should flourish." *Fisher* v. *Pace*, 336 U.S. 155-166 (1949) (Douglas, J. dissenting). In another context, the Court has characterized litigation as "a form of political expression." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963).

with respect to said contempt action and is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge.

"4. That in addition to the foregoing, said Judge Carlton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz., Leonard W. Holt, Esq., the effect of which is to seriously hamper the efforts of said Leonard W. Holt in defending the said E. A. Dawley, Jr.; that said harassment and intimidation arises out of and is connected solely with said Leonard W. Holt's participating in the defense of said E. A. Dawley, Jr. in the contempt action; that part of said harassment and intimidation occurred at a hearing of this contempt action in the Hopewell Circuit Court on January 8, 1962, at which hearing the said Carlton E. Holladay revealed that he had been making an independent investigation and inquiry of Mr. Holt's conduct in this contempt defense, and said Judge at said place and time made the statement that he would 'deal with' said Leonard W. Holt after he, the judge, had dealt with said E. A. Dawley, Jr." 381 U.S. at 133.

The Court concluded, as it must here, that:

". . . [T]he words used in the motions were plain English, in no way offensive in themselves, and wholly appropriate to charge . . . bias of the presiding judge." 381 U.S. at 137.

Particularly relevant was this Court's holding regarding the view of the Supreme Court of Appeals of Virginia that Holt's motion was "insulting," since Art. 22(3) specifically employs that word. The Court recognized the ease with which *any* motion alleging judicial bias can be seen as "insulting" and concluded that:

> ". . . if the charges were 'insulting' it was inherent in the issue of bias raised, an issue which we have seen had to be raised, according to the charges, to escape the probability of a constitutionally unfair trial." 381 U.S. at 137.

The Court has consistently been sensitive to the way contempt proceedings can be used as an instrument of vindictiveness by a judge whose personal feelings have been aggrieved. For that reason it has held that such proceedings are to be reserved for instances of "obstruction and outrage" inasmuch as "[t]he power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged." *Offutt v. United States*, 348 U.S. 11, 14 (1954). The language of Art. 22(3) invites abuse at the hands of over-sensitive trial judges. It leaves to such a judge the determination whether counsel has been "insulting, abusive or discourteous," a subjective judgment which is notoriously unreliable.

One commentator has noted that the "law of contempt is not the law of men, it is the law of kings. It is not law which representative legislators responsibly reflecting the *vox populi* originally wrote, but is rather derived from the divine law of kings . . ." The awesome power of contempt must therefore be

---

[11] Goldfarb, *op. cit.* at 11.

> "seen through the perspectives of its age of inception, an age of alleged divinely ordained monarchies, ruled by a king totally invested with all sovereign legal powers and accountable only to God. Under any circumstances resistance to the king was a sin which would bring damnation."[1]

Considering this history, the inherent characteristics of contempt, and the view that "the contempt power is a potential instrument of oppression," *Green v. United States*, 356 U.S. 165, 188 (1958), Art. 222(3) must be held to violate the First Amendment on its face.

If not unconstitutional on its face, Art. 222(3) is surely unconstitutional as applied in this case, for it permitted appellant to be held in contempt for filing a motion which only utilized the words of another Louisiana statute.[2] Judged by tradition and case law, appellant's words fall far short of expression that has been barred from the courtroom.

The British practice involving contempt, from which American rules were derived, properly allowed for wide latitude of speech and expression by counsel:

> "An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any

---

[1] Goldfarb, *op. cit.* at 11-12.

[2] Art. IX, Sec. 1, Louisiana Constitution which provides:
"All state and district officers, whether elected or appointed, shall be liable to impeachment for high crimes and misdemeanors in office, incompetency, *corruption, favoritism*, extortion, or *oppression* in office, or for gross misconduct, or habitual drunkenness."

> adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate thinks irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case."[14]

American jurisprudence, never comfortable with the attempt because of the hostility of due process to summary proceedings,[15] has given substantial protection to an attorney's right to free expression in court proceedings. In *Holt* v. *Virginia*, *supra* at 136, this Court implied that expression in the courtroom might not be punished unless a participant is found to have done such acts as "disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties."

In re McConnell, 370 U.S. 230 (1962), involved a situation well beyond that at issue here. The attorney, in ob-

---

[14] Oswald, Contempt of Court (3rd edition), at 56-57.

[15] "It is abhorrent to Anglo-Saxon justice as applied in this country that one man, however lofty his station or venerated his vestments, should have the power of taking another man's liberty from him. Society has always permitted one exception—the limited power of courts to punish for contempts. But that exception has been grudgingly granted, and has been held down uniformly to 'the . . . least possible power adequate' to the end proposed." *Ballantyne* v. *U. S.*, 237 F.2d 657, 666-667 (5th Cir. 1956).

jecting to the court's instruction that he not continue with questions that had been ruled inadmissible, was cited for contempt for the following statement:

> "We have a right to ask questions which we offer on this issue and Your Honor can sustain their objection to them. *We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.*" (Emphasis in the original.) 370 U.S. at 235.

The Court held that an attorney could not be punished for a statement in court absent actual obstruction of justice:

> "It is true that petitioner stated that counsel had a right to ask questions that the judge did not want asked and that 'we propose to do so unless some bailiff stops us.' The fact remains, however, that the bailiff never had to interrupt the trial by arresting petitioner, for the simple reason that after this statement petitioner never did ask any more questions along the line which the judge had forbidden. And we cannot agree that a *mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice* that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts. The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." (Emphasis added.)

United States v. *Sopher*, 347 F.2d 415 (7th Cir. 1965), reversed the contempt conviction of an attorney whose closing argument to the jury was found improper. Even though the attorney "as a member of the bar . . . owed the court a more careful appraisal of the record . . . before advancing the argument he attempted," the court said, "his failure in this respect is too tenuous a basis to support a finding of contempt." 347 F.2d at 418. Adopting the strict standard characteristic of contempt cases, the court was impressed that, "it was not clearly shown that appellant's conduct, although unjustifiable, actually obstructed the District Judge in the performance of judicial activity." *Ibid.*

These cases involving speech by counsel, though far more serious than appellant's, did not sustain contempt convictions. Cases involving motions demonstrate the same result.[16] All these cases give considerable latitude to the

---

[16] See, for example, *Woolley* v. *Superior Court*, 19 Cal. App. 2d 611, 66 P.2d 680 (1937) (motion for disqualification alleged that judge had indicated his belief in defendant's guilt during the course of the trial and that he participated at trial in order to obtain evidence favorable to the plaintiff's); *Walker* v. *People*, 126 Colo. 135, 248 P.2d 287 (1952) (motion for disqualification alleged that judge "has previously expressed and exhibited a determination to bring about a conviction, and if possible, the execution of the petitioner, regardless of the law or facts. . . ."); *Blankenbaker* v. *State*, 201 Ind. 142, 166 N.E. 265 (1929) (motion for disqualification alleged that judge announced to the jury "that he knew enough of the record to send defendant to the electric chair"); *Callahan* v. *Callahan*, 30 Idaho 431, 165 P. 1122 (1917) (motion for change of venue alleged that opposing party's friendship and influence with judge made fair trial impossible); *State* v. *Simon*, 154 La. 73, 97 So. 302 (1923) (motion for disqualification alleged that the judge had instigated the prosecution "as a last and desperate attempt to punish the accused for not supporting him in the last preceding election"); *State ex rel. Moore* v. *District Court*, 116 Mont. 305, 151 P.2d 1002 (1944) (litigant moved for disqualification on ground that the "Court has been charged with

framing of pleadings of bias, to argument, and to questions, and must be read as vindicating the right to free expression in court proceedings.

It would indeed be anomalous if this Court were to adopt an unduly restrictive First Amendment rule for courts while insuring its broadest reach elsewhere. *See Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *United States* v. *Robel*, 389 U.S. 258 (1967); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Something of the rationale of the out-of-court contempt cases is surely appropriate for the courtroom. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).[17] Indeed

---

stealing a receipt for $3000 which I trusted them with . . . ."); *Le Hane* v. *State*, 48 Neb. 105, 66 N.W. 1017 (1896) (affidavit of prejudice alleged that judge silently concurred in his son's threat to prevent affiant from practicing law because of a political dispute); *Ponder* v. *Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951) (motion for disqualification alleged that judge took an active part in opposing party's political campaign and that "the great majority of the people . . . regardless of the decision of the court . . . would feel that political considerations were the determining factor"); *State* v. *Brown*, 8 Okla. Crim. 40, 126 P. 245 (1912) (prosecution charged that judge "did at various and sundry times have private and secret consultations relative to and pertaining to the merits of the case" with the defendant); *Commonwealth* v. *Sheasley*, 102 Pa. Super. 384, 157 A. 27 (1931) (motion for disqualification charged judge with cooperating with opposing counsel to defeat petitioner's cause).

[17] "[T]he actual interference with the administration of justice by an individual would, in most cases, be less than that of the ubiquitous and powerful press, [but] the individual's greater susceptibility to contempt conviction is indicated by the decisions. Possibly this is explained by the fact that so many cases of contempt by individuals arise out of special incidents involving affronts to judges. Though the wrong to society in such a case is unques-

this Court has applied the same test for judging both in-court and out-of-court contempt—interference with the administration of justice. See, e.g., *Pennekamp* v. *Florida*, *supra* at 347. If the First Amendment bars "shielding judges from published criticism," *Bridges* v. *California*, *supra* at 270, originating outside the courts; it cannot seriously be argued that the "criticism" inherent in a motion for recusation filed to protect a litigant's rights in court is contemptuous. The Court in *Bridges* said that "enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id.* at 270-271. This view is as applicable to courtroom proceedings where "enforced silence" would put in jeopardy the constitutional rights of litigants.

If Art. 222(3) is applied to sustain the conviction in this case, it will herald the exclusion of the First Amendment from the courtroom. This Court's decisions point the opposite way. It should be made explicit that, both inside and outside the courtroom, "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice," *Pennekamp* v. *Florida*, *supra* at 347.

---

tionably less than the situation where the press actively invades a trial, the result in terms of responsibility is often opposite. There is a danger that these convictions realistically may be more a result of governmental power being exercised for personal and emotional reasons than a desire to foster the efficient administration of justice." Goldfarb, *op. cit.* at 192-193.

B. *Art. 222 § violates the First and Fourteenth Amendments because it is vague and overbroad.*

Art. 222(3) was first enacted in 1950. In neither this nor in any previous case has the Louisiana Supreme Court limited its language. Thus this case is unlike *Garner v. Louisiana*, 368 U.S. 157 (1961), in which the Court had before it an authoritative decision of the Supreme Court of Louisiana found to exclude the behavior at issue. There can be no doubt that the Louisiana Supreme Court has given its approval to an overly broad statute punishing speech described in the vague language of "insulting," "abusive," "discourteous" and "irrelevant."

A contempt statute regulating speech must of course meet the same requirements of narrowness as other statutes affecting speech. But such a statute bears an additional burden because of the summary nature of the proceedings authorized to enforce it.

> "[T]he grant of summary contempt power . . . is to be strictly construed so that the instances where there is no right to a jury trial will be narrowly restricted to the historic cases where concession of this drastic power to the courts is necessary to enable them to preserve . . . authority . . . order . . . decorum." *Farese v. [illegible]*, [illegible] F.2d 312, 315 (1st Cir. 1954).

Art. 222(3) does not meet the minimum requirements of narrowness in cases of contempt proceedings nor those required of a statute touching the First Amendment area and is clearly overbroad.

> *[illegible] v. [illegible]*, 244 La. 604, 181 So.2d 41 (1965).
>
> *[illegible] v. [illegible]*, 201 La. 961, 14 So.2d 778 (1943).

This Court has said of vagueness that if "words and phrases are vague and indefinite . . . any penalty prescribed for their violation constitutes a denial of due process of law." *Champlain Ref. Co. v. Corporation Comm.*, 286 U.S. 210, 243 (1932). See *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

Looking to the specific language of Art. 222(3), it is clear first that the statute is void for vagueness because it fails to give fair warning of the prohibited conduct or afford an adequate standard of guilt. *International Harvester of America v. Kentucky*, 234 U.S. 216 (1914). An attorney with a claim to press on behalf of a client must wonder at what the court will consider "insulting," "abusive" or "discourteous." And despite the usual uncertainty surrounding questions of relevance and irrelevance at trial, he must be concerned that whatever the judge deems "irrelevant criticism" may be held to be contemptuous. Such words lend themselves more to abuse than to definition. They are in the same category as language such as "unreasonable," *Cline v. Frink Dairy Co., supra*, and "sacrilegious," *Burstyn v. Wilson*, 343 U.S. 495 (1954), held unconstitutionally vague by this Court.

"The vice of unconstitutional vagueness is further aggravated where as here the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961). A statute addressed to behavior that may be regulated must nevertheless be drawn so as to avoid overbreadth which risks the inclusion of First Amendment activity in what is barred:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

The rule against overbreadth takes cognizance of the ease with which protected expression can be stifled through the use of statutes which may at first appear to do no more than exercise lawful power. This special rule in the First Amendment area has evolved out of this Court's recognition that "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *United States* v. *Robel*, *supra*.

To avoid overbreadth, a contempt statute must be limited to words which are in fact disruptive of judicial proceedings, or else protected words may also be punished. But under Art. 222(3), as drawn and interpreted, *all* "insulting, abusive, or discourteous language of irrelevant criticism" is contemptuous, even if it in no way interferes with or disrupts the proceedings.

This Court has avoided the problem of overbreadth in contempt statutes by limiting the contempt power to situations of actual "obstruction of judicial duty," *Ex parte Hudgins*, 249 U.S. 378, 383 (1919), finding that,

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted . . . "

This Court has left no doubt as to the continuing vitality of the "actual obstruction" test. Reversing the contempt conviction of a lawyer in *In re McConnell, supra* at 236, this Court said:

> "The argument of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in performance of his judicial duty. The petitioner created no such obstacle here.
>
> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom . . . it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their client's cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice."

Indeed, Sections (1) and (2) of Art. 222,[20] although they deal with "behavior" and "conduct" rather than with the

---

[20] "Any of the following acts constitutes a direct contempt of court:

"(1) Contumacious, insolent, or disorderly behavior toward the judge, or an attorney or other officer of the court, *tend-*

more specific categories of speech are never limited than Sec. (3) which deals only with expression. Sections (1) and (2) are at least in part specifically limited by the words "tending to interrupt or interfere with the business of the court," language connoting partial observance of the required standard. But even this minimal limitation is dropped from Sec. (3) relating to verbal speech and written documents, thereby resulting in greater protection for conduct than for words, the category of expression which enjoys the greatest protection of the First Amendment. Instead Art. 2(3) is defined by vague words reflecting the most subjective connotations: "insulting," "abusive," "disrespectful," and "irrelevant criticism." Such words and "phrases of inherent discretion" cannot regulate the expression of an attorney, who owes his highest duty to ethical and constitutional considerations.

Moreover, Art. 2(3) is overbroad in that it can indiscriminately reach intentional and unintentional conduct. But scienter cannot be found where:

> "Positive evidence of a deliberate intent to pursue a course of improper argument or prohibited conduct is absent." *United States v. Sophie*, 347 F.2d 413 (7th Cir. 1965).

> ... to interrupt or interfere with the business of the court, or to impair its dignity or respect for its authority ... Breach of the peace, boisterous conduct or other disturbance tending to interrupt or interfere with the due business of the court, or to impair its dignity or respect for its authority." Emphasis added.

Accordingly, "The Void for Vagueness" doctrine in the Supreme Court, [illegible]

See also *[illegible]*

States v. *Thompson*

v. *United States*

111 F.2d 925 (

(9th Cir. 1939).

A comparison between the federal contempt statute, 18 U.S.C. § 401, and Art. [illegible] further demonstrates the vagueness and overbreadth of the legislation.

Section 401 provides that

> "A court of the United States shall have power to punish by fine or imprisonment, [illegible] contempt of its authority, and none other, as

> (1) Misbehavior of any person in its presence so near thereto as to obstruct the administration of justice;

> [illegible]"

Thus, by its terms, Section 401(1) limits contempt to misconduct which obstructs the administration of justice. The statute has made clear that this court's jurisdiction is not a matter of legislative grace but is compelled. *In re* [illegible] limitation of contempt to misconduct of such a nature as to

> "a Congressional intent to [illegible] exclusive jurisdiction [illegible] power [illegible] federal [illegible]

for the [illegible]

> this, we have said: 'would permit too great inroads on the procedural safeguards of the *Bill of Rights*, since contempts are summary in their nature and leave determination of guilt to judges rather than a jury.'" (Emphasis added.) *Ibid.*

See also *In re Michael*, 326 U.S. 224, 227 (1945); *Nye v. United States*, 313 U.S. 33, 44-48 (1941). Since Art. 222(3) does not expressly limit contempt to obstruction of justice the article cannot stand unless limited by judicial decision. The Louisiana Supreme Court has declined to so limit its statute.

Infected with both vagueness and overbreadth, Art. 222(3) discourages vigorous advocacy by attorneys. Considering especially the treatment of this case by the Louisiana courts, Art. 222(3) stands as a dangerous deterrent to fearless speech where it is most needed because it is "too incomprehensible . . . too approximative . . . too discretion-giving" and because it "injects into the governmental wheel so much free play that in the practical course . . . it is likely to function erratically—responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society."[10]

Instead of a statute narrowly drawn to encompass only truly contemptuous conduct, Art. 222(3) by its terms and

---

[9] Compare decisions of this Court limiting statutory language to save its constitutionality. *Stevens v. United States*, 325 U.S. 91 (1945); *United States v. Harriss*, 347 U.S. 612 (1954).

[10] Amsterdam, *supra* at 90.

as interpreted in this case strays beyond the legitimate boundary of contemptuous behavior and intrudes upon the perimeter of decorous pleading. Louisiana, like the Congress in *United States* v. *Robel*, *supra*, was free to regulate unprotected behavior. It is unlikely that this Court would tolerate broader language in a contempt statute than in a statute affecting national security as in *Robel* (389 U.S. at 267-268):

> . . . Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms. *Shelton* v. *Tucker*, *supra*, cf. *United States* v. *Brown*, 381 U.S. 437, 461.

Louisiana, like Congress, must draft and interpret its contempt statute narrowly if it is to meet constitutional standards. It has failed altogether to do so here.

II.

Appellant was denied due process of law because the record is barren of any evidence to support his conviction.

A state conviction unsupported by any evidence violates the due process clause of the Fourteenth Amendment. *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, *supra*; *Barr* v. *City of Columbia*, 378 U.S. 146 (1963); *Johnson* v. *Florida*, 391 U.S. 596 (1968). The record in this case is barren of any evidence.

The only evidence in the record of this case is appellant's motion to recuse. In pertinent part it reads as follows:

> "The plaintiff herein, Lewis P. Hopkins, Jr., and his chief witness in this case, Mr. Charles Anderson, III, are presently engaged in the process of attempting to have Judge Dixon removed from office as being unfit therefor by virtue of *corruption, favoritism, oppression* and malfeasance in office."

The italicized words are taken directly from the Louisiana constitutional provision establishing the criteria for impeachment of elected or appointed state officers, including judges. That provision, Art. IX, Sec. 1 of the Louisiana Constitution, reads as follows:

> "All state and district officers, whether elected or appointed, shall be liable to impeachment for high crimes and misdemeanors in office, incompetency, *corruption, favoritism*, extortion, or *oppression* in office, or for gross misconduct, or habitual drunkenness."

The words in the motion are not appellant's characterization of the judge. As written, the motion asserts that appellant's client was attempting to have Judge Dixon impeached for the reasons set out in Art. IX, Sec. 1. Assuming the truth of that assertion (and there is nothing in the record to establish either its truth or falsity), appellant surely had a duty to file the motion to recuse Judge Dixon who may have heard of the plaintiff's efforts to impeach him and would, understandably, therefor, be biased against him. That, of course, was the basis for the conclusory allegation in the motion which asserted that Judge Dixon was "therefore interested in the cause." The latter language, too, is statutory. They are the words used in Art. 15[illegible] which sets out the grounds for recusal:

> "'A judge of any court, trial or appellate, may be recused when he [illegible] (5) is interested in the cause."

Thus appellant alleged only what was factually necessary: the statutorily endorsed proceedings against the judge in which his client was engaged, and his belief that the judge was "therefore interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward plaintiff in that he would be unable to give a fair trial in this matter." Surely such language alleging bias does not go "beyond what is necessary, where [the facts] involve the judicial acts or character of the judge." *Hughes v. People*, 3 Colo. 430, 431 (1880). And

---

In drawing a motion for recusation the basis of the alleged interest must be stated. In *State v. Bienvenu*, 124 La. 302, 50 So. 13 (1909), the Louisiana Supreme Court said: "Where a motion assigns no legal grounds for recusation it must be overruled without reference to another judge." *State v. Calhoun*, 124 La. [illegible] 78, 7 So. 501. See also *Strawbridge v. Pittsburgh*, 230 Pa. 405, 79 Atl. 162 (1912).

the attempt of the Attorney General of Louisiana to rewrite the motion as he believes it should have been presented is not only an intolerable intrusion on an attorney's right to express himself freely within the bounds of propriety, but might have proved legally deficient in failing to specify that bias flowed from the judge's interest.[20]

Thus, assuming the validity of Art. 222(3), there is no evidence here of its violation by appellant. Even if Judge Dixon thought the language in the motion was "insulting, abusive or discourteous," appellant could not be convicted for asserting the fact that his client was attempting to have the judge impeached for reasons set out in the Louisiana Constitution and for asserting the inference to be drawn from that fact, namely, that the judge might therefore be biased. There is no evidence that appellant himself was "insulting, abusive or discourteous" in manner when he submitted the motion to recuse, nor is there any evidence that he was "insulting, abusive or discourteous" by virtue of his stating to the judge that he, the appellant, believed the judge guilty of "corruption, favoritism, oppression and malfeasance in office."

---

[20] The Attorney General's "motion" would have assumed rather than alleged bias: "(a) Mr. Spencer's clients were attempting to remove Judge Dixon from office, (b) Judge Dixon was aware of the circumstances, (c) being apprised of the fact, Judge Dixon should be recused." Brief on Behalf of Respondent Trial Judge in Support of Motion to Dismiss or Alternatively Affirm, p. 15.

CONCLUSION

For the reasons stated above, the conviction should be reversed.

Respectfully submitted,

MELVIN L. WULF
ELEANOR HOLMES NORTON
American Civil Liberties Union
Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for Appellant

March 19, 1970

APPENDIX

Motion and Order for Recusation

Now Into Court, through undersigned counsel, comes Lewis P. Hopkins, Jr., plaintiff in the above captioned matter, who with respect represents:

1.

That the instant proceeding is an uncontested suit for separation from bed and board based upon abandonment.

2.

A preliminary default was entered herein on January 5, 1968.

3.

That on March 20, 1968, the instant proceeding was brought before the Court for confirmation of default and despite overwhelming evidence of the abandonment of petitioner by defendant, the trial judge, Honorable John A. Dixon, Jr., dismissed plaintiff's suit giving as the oral reasons therefor that the plaintiff had not proven a case of abandonment.

4.

The plaintiff herein, Lewis P. Hopkins, Jr., and his chief witness in this case, Mr. Charles Anderson, III, are presently engaged in the process of attempting to have Judge Dixon removed from office as being unfit therefor by virtue of corruption, favoritism, oppression and misfeasance in office.

5.

Plaintiff alleges, on information and belief, that Judge Dixon, First Judicial District Court for Caddo Parish, Louisiana, is therefore interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward plaintiff in that he would be unable to give a fair trial in this matter.

6.

Plaintiff has applied for a new trial limited to rehearing in this matter and alleges, on information and belief, that for the reasons set out hereinabove, the Honorable John A. Dixon, Jr., would be unable or unwilling to give a fair and impartial rehearing in this matter.

7.

Plaintiff alleges, on information and belief, that Judge John A. Dixon, Jr., First Judicial District Court for the Parish of Caddo, is interested in the cause in that he is so biased and prejudiced and harbors such personal animosity toward counsel for plaintiff that he was unable or unwilling to give a fair trial in this matter.

8.

Although counsel for plaintiff was aware of animosity on the part of the trial judge herein prior to the attempted confirmation of default, he was not aware, and the plaintiff was not aware, that the aforesaid animosity, bias, prejudice and interest would prevent a fair trial in this matter.

WHEREFORE, plaintiff respectfully prays that the Honorable John A. Dixon, Jr. recuse himself in this cause or refer this motion to another judge or a judge ad hoc for a hearing in accordance with Article 155 of the Louisiana Code of Civil Procedure and the rules of the First Judicial District Court.

/s/ DAN A. SPENCER
Suite 7, Dixie Building
1639 Kings Highway
Shreveport, Louisiana
Attorney for Plaintiff